

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICHARD K. KEPLER

Claimant

VS.

NEW YORK AIR BRAKE

Respondent

AND

UTICA NATIONAL INSURANCE GROUP

Insurance Carrier

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Docket No. 245,211

ORDER

Claimant appeals the April 12, 2002 Award of Administrative Law Judge Steven J. Howard. Claimant contends he is entitled to a work disability as the injuries suffered to his right foot allegedly aggravated problems in claimant's left hip and low back. Respondent contends that the Administrative Law Judge's Award should be affirmed, arguing the problems with claimant's hip and back are more likely related to a stroke claimant suffered in 1998, rather than the work-related injury to his foot in 1999. The Appeals Board (Board) heard oral argument on January 7, 2003.

APPEARANCES

Claimant appeared by his attorney, James E. Martin of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Frederick L. Haag of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment during the periods alleged?
- (2) Are the parties covered by the Kansas Workers Compensation Act?
- (3) What is the nature and extent of claimant's injury and/or disability?

Claimant originally appealed the Administrative Law Judge's determination that claimant was entitled only to 18.43 weeks temporary total disability compensation. At oral argument before the Board, claimant advised that that issue was no longer before the Board. The Board, therefore, affirms the Administrative Law Judge's determination that claimant is entitled to 18.43 weeks temporary total disability compensation at rate of \$291.87 per week totaling \$5,378.16.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds the Award of the Administrative Law Judge should be affirmed with regard to the disability suffered by claimant and the amount of compensation due, but reversed as to the Order for Reimbursement from the Kansas Workers Compensation Fund (Fund).

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own as though specifically set forth herein.

Claimant suffered accidental injury through a series of accidents to his right foot from February 1, 1999, through June 1, 1999, claimant's last day worked with respondent. Claimant developed a blister on his right big toe and, as a result of claimant's type II diabetes, this blister developed into serious complications, ultimately resulting in an amputation of the toe. The amputation of the toe caused additional complications, resulting in claimant's right second toe developing what is described as a hammer toe condition. Claimant underwent a follow-up surgery in February of 2000 to correct this problem. Claimant also alleges as a result of the altered gait from this right foot treatment, that he developed left hip and low back problems. The record is contradictory regarding whether claimant had hip and back problems and, if so, whether they stemmed from claimant's right foot injury or whether they occurred as a result of left leg difficulties suffered by claimant after a July 1998 brain stem stroke.

The medical evidence in the record is contradictory regarding whether claimant limped on his right foot or limped on his left foot or limped at all. Medical evidence supports both claimant's and respondent's positions, and likewise defeats both positions, with health care providers testifying that claimant's leg problems may have resulted from his diabetic neuropathy or even from osteoarthritis.

However, it is claimant's burden under the Workers Compensation Act to prove his entitlement to the benefits requested.¹ The Board finds, in this instance, claimant has proven that he suffered accidental injury arising out of and in the course of his employment through a series of accidents culminating on June 1, 1999, with the injury limited to his right foot. The condition to claimant's hip and low back has not been shown by a preponderance of the credible evidence to be connected to the foot injury. Instead, the medical evidence supports a multitude of other possibilities. The Board, therefore, affirms the finding by the Administrative Law Judge that claimant suffered a 19 percent impairment to his right foot based upon the evidence of board certified orthopedic surgeon and foot specialist Greg A. Horton, M.D.

In the Award, the Administrative Law Judge determined that claimant had been overpaid \$3,158.07 and ordered the Fund to reimburse respondent for that amount. K.S.A. 44-534a (Furse 1993) states that the Director shall determine the amount of compensation paid by the employer or the insurance carrier which is to be reimbursed by the Fund. The Director is then instructed to certify to the Commissioner of Insurance the amount so determined. The Administrative Law Judge did not have the authority to make the above determination. In that regard, the Award of the Administrative Law Judge is reversed. Any overpayment alleged by respondent should be presented to the Director for a determination and, if appropriate, certification to the Insurance Commissioner pursuant to K.S.A. 44-534a (Furse 1993).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated April 12, 2002, should be, and is hereby, reversed regarding the reimbursement to respondent by the Kansas Workers Compensation Fund, but in all other regards is affirmed.

IT IS SO ORDERED.

¹ K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

Dated this ____ day of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Frederick L. Haag, Attorney for Respondent
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Director